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JAMES D. MAHER,
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Supreme Court of the United States

OCTOBER TERM 1918.

No. 256.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Petitioner,

against

SAMUEL GOLDBERG,

Respondent.

BRIEF FOR PETITIONER.

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of Counsel.

Supreme Court of the United States

NEW YORK CENTRAL RAILROAD COMPANY, *Petitioner,* *against* SAMUEL GOLDBERG. *Respondent.*	No. 256—October Term 1918.

On Writ of Certiorari to the Supreme Court of the State of New York, County of New York

BRIEF FOR PETITIONER

STATEMENT OF THE CASE

This case comes to this court on a Writ of Certiorari issued by this Court on October 25, 1917, to review a judgment of the Supreme Court of the State of New York, County of New York, dated May 29, 1917, entered on an order and judgment of the Court of Appeals of the State of New York (pp. 31 and 33), which affirmed a judgment of the Appellate Division of the Supreme Court of the State of New York (p. 27) which latter judgment affirmed a judgment of the Supreme Court, New York County, in favor of the Respondent (Plaintiff) and against the Petitioner (Defendant) for the sum of $749.38 (p. 7).

Facts.

It is alleged in the complaint that on or about September 17th, 1912, at New York City, the defendant in consideration of the payment to it by the plaintiff of the usual freight rate for the transportation of dry goods from New York City to Cincinnati, agreed safely to carry to Cincinnati and there deliver to the plaintiff certain property of the value of $693.75, and that defendant did not carry said goods pursuant to said agreement, but on the contrary permitted same to become lost or stolen in transit, (Complaint, p. 3).

In its answer defendant set up as a separate defense that if it received the property mentioned in the complaint for transportation, the same was received by it pursuant to the terms of a written agreement wherein it was described as consisting of dry goods; that defendant had theretofore filed with the Interstate Commerce Commission copies of its classifications and schedules of rates for the transportation of dry goods and furs from New York to Cincinnati, which provided for a first-class rate on dry goods and double first-class rate on furs; that defendant relied upon the description contained in the bill of lading issued by it for the transportation of the property and agreed to transport same at the rate provided in said tariffs and classifications for the transportation of dry goods; that the property was stolen in transit and thereafter defendant learned that the case contained furs and not dry goods. (Answer Pages 4-5).

Defendant's Exhibit "A", is the bill of lading which the defendant issued for the transportation of the property. The description contained therein is, "One (1) Case D. G." meaning dry goods. This description was inserted in the bill of lading by August Smith to whom

the case of goods was delivered by Steinbach Brothers, the shippers, for delivery to the defendant and who testified that he got the information from which he filled out the bill of lading, which was one of the defendant's blank forms, from the case; and that he had instructions from his employer to describe all cases of goods which he handled as dry goods (pp. 17-19).

Plaintiff's Exhibit 1, is an invoice from Steinbach Brothers to the consignee and contains a list of the various articles in the case and the invoice price of each article. The contents of the case consisted entirely of furs, some imitation and some real (fols. 58-60).

Steinbach Brothers are manufacturing furriers and do not ship dry goods (p. 14). On June 1, 1913, they delivered to the defendant three cases of furs which were described in the bill of lading as dry goods. Defendant's Exhibit "B".

Over defendant's objection and exception plaintiff was permitted to introduce testimony of officers and employes of the firm of Steinbach Brothers to the effect that the case was marked "Furs, Value $750.00" (p. 13). Plaintiff's witness Shimm testified that the name and address of the consignee was marked on the middle of the case and, the words "Furs. Value $750" was on the corner of the case (p. 15).

It was conceded by the plaintiff that at the time the property was received by the defendant the official classification filed by it with the Interstate Commerce Commission provided for a first-class rate on dry goods and double first-class rate on furs; that the first-class rate between New York, N. Y., and Cincinnati, Ohio, was 65c per hundred pounds and double first-class rate $1.30 per hundred pounds. (p. 19)

Defendant conceded that it received the case for transportation and that it was stolen in transit and not delivered to the consignee (p. 12).

Joseph M. Bulger employed by the defendant as Chief Billing Clerk at its station at 33rd Street, New York City, where the defendant received the property for transportation, testified that when property is received, the receiving clerk signs the bill of lading, of which defendant's Exhibit "A" is a copy, and that paper is returned to the shipper. A duplicate of the bill of lading is retained by the defendant which is sent to the office of the billing clerk for the purpose of fixing the rate which is determined from the description of the property shown in the bill of lading.

The billing clerk does not see the packages when fixing the rate, but relies entirely on the description contained in the bill of lading (p. 23). This witness also described the method of receiving and loading property at defendant's 33rd Street Station and testified that after he received the duplicate bill of lading, he filled out from that bill of lading a waybill, which is forwarded to destination with the property, in which is inserted the name of the consignee, description of the property, the rate charged for the transportation and the number and initials of the car in which it was transported, etc. Defendant's Exhibit "C", (p.49), is a copy of the waybill issued by defendant for this case of goods. This exhibit shows that the weight of the case was three hundred and sixty-five pounds, the rate sixty-five cents per hundred pounds, total freight charges $2.35. Unless there is some reason to believe that the shipper misrepresents the property, no inspection is made to determine whether the articles shipped are as described in the bill of lading (pp. 21-22). The official classification filed with the Interstate Commerce Commission and in effect on the day the property was received by defendant, was offered in evidence by the defendant. (Defendant's Exhibit D, page 25).

Brief of the Argument.

1. The defendant is not liable for the loss of goods of a different character than those described in the bill of lading and for the transportation of which a higher rate is established by its filed schedules. (*Southern Express Co.* v. *Byers*, 240 U. S. 612; *New York Central &c. Co.* v. *Beahan*, 242 U. S. 148; *D'Utassy* v. *Barrett*, 219 N. Y. 420; *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Kansas City Southern Ry.* v. *Carl*, 227 U. S. 639; *Great Northern Ry.* v. *O'Connor*, 232 U. S. 508; *Mo. Kans. & Tex. Ry.* v. *Harriman*, 227 U. S. 657; *Southern Ry.* v. *Prescott*, 240 U. S. 632; *Humphreys* v. *Perry*, 148 U. S. 627; *Hart* v. *Pennsylvania Railroad Co.*, 112 U. S. 331-342.

2. The fact that the Trial Court found the misdescription was made without fraudulent intent is not material; the plaintiff is concluded by the bill of lading and the filed tariffs, and his remedy if any is against his agent who misdescribed the property. *Great Northern Ry. Co.* v. *O'Connor, supra; Wells, Fargo & Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469; *Reid* v. *American Exp. Co.*, 241 U. S. 544.

3. The Court erred in admitting evidence as to the marks on the case of goods. *Atchison &c. Ry. Co.* v. *Robinson*, 233 U. S. 173; *D'Utassy* v. *Barrett, supra.*

4. There was no duty on the part of the defendant to inspect the contents of the case and it is not liable because of its failure to do so. *Wells, Fargo & Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469; *Great Northern Ry. Co.* v. *O'Connor, supra.*

POINT ONE.

The defendant is not liable for the loss of goods of a different character than those described in the bill of lading, and for the transportation of which a higher rate is established by its filed schedules.

The shipment in question was an interstate one, the property having been consigned from New York City to Cincinnati, Ohio. The rights and liabilities of the parties, therefore, depend upon the Interstate Commerce Act, the bill of lading, the schedules of the carrier filed with the Interstate Commerce Commission pursuant to the Act, and common law rules as accepted and applied in Federal tribunals. (*Southern Express Co.* v. *Byers*, 240 U. S. 612; *New York Central &c. Co.* v. *Beahan*, 242 U. S. 148; *D'Utassy* v. *Barrett*, 219 N. Y. 420.)

The Trial Justice held that the contract between the parties recognized the fact that accuracy of description was not essential to the carrier's accepted duty to transport and deliver the goods because the bill of lading contained a provision that "if upon inspection it is ascertained that the articles shipped are not those described freight charges must be paid upon the articles actually shipped"; that the evidence did not show that the error in description had anything to do with the loss of the property, and following the authority of *Rathbone* v *The N. Y. C. & H. R. R. R. Co.*, 140 N. Y. 48, found that the defendant had accepted the shipment truly and plainly marked "furs" with notice of what was shipped and under an agreement to transport it, and was therefore liable for its loss (pp. 9-11).

The Appellate Division in its opinion written upon the affirmance of judgment, says that the decisions of this Court in *Adams Ex. Co.* v. *Croninger*, 226 U. S. 491

and other cases upon which the defendant relied, and in which it was held that where a carrier has filed alternative rates based upon the value of property its liability does not exceed the value specified in the bill of lading, do not go to the extent of relieving the carrier from all liability; that those cases are inapplicable because here there was no misstatement of *value* but merely a nonfraudulent misstatement of the *kind* of goods shipped, and for that reason and because there was no specific clause in the present bill of lading exempting the defendant from liability in case of a misdescription of the property, it held that defendant was liable for the value of the furs, but that it had the right to collect the difference in freight if it discovered the mistake and that the shipper was criminally liable if he knowingly and wilfully misdescribed the contents of the package (pp. 28-30).

No opinion was written by the Court of Appeals.

We respectfully submit that the Appellate Division misapprehended the grounds upon which the recent Federal cases referred to are based; that the reason why it was held in those cases the carrier was not liable for the loss of goods of a higher value than those specified in the bill of lading was that the transportation charges were based upon such valuation, that the carrier received no compensation for transporting goods of a higher value and there was therefore no agreement to transport same, and that to permit a shipper who has obtained the lower of two rates based upon value to recover a higher valuation than that made the rate basis would enable him to obtain a preference over other shippers who had paid the higher rate, and defeat the primary purpose of the Interstate Commerce Act which requires equal treatment of all shippers and the charging of one rate to all, and that, the rate on file as required by the Act.

The case is not one involving an attempt on the part of the carrier to exempt itself from liability for a loss for which it is liable under the law or under its contract of transportation. The only question involved is whether a carrier is liable for the loss of goods not described in the bill of lading and which it did not agree to transport.

In *Adams Express Co.* v. *Croninger*, 226 U. S. 491, the court says (pages 509-511):

> "That a common carrier cannot exempt himself self from liability for his own negligence or that of his servants is elementary. *York Mfg. Co.* v. *Illinois Central Railroad*, 3 Wall. 107; *Railroad Company* v. *Lockwood*, 17 Wall. 357; *Bank of Kentucky* v. *Adams Express Company*, 93 U. S. 174; *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331, 338."
>
> "That such a carrier might fix his charges somewhat in proportion to the value of the property is quite as reasonable and just as a rate measured by the character of the shipment. The principle is that the charge should bear some reasonable relation to the responsibility, and that the care to be exercised shall be in some degree measured by the bulk, weight, character and value of the property carried.
>
> "Neither is it conformable to plain principles of justice that a shipper may understate the value of his property for the purpose of reducing the rate, and then recover a larger value in case of loss."
>
> " 'But such a contract as we are considering in this case is not an exemption from liability for negligence in the management of property, within the meaning of the statute. It is a contract as to what the property is, in reference to its value. The purpose of it is not to change the nature of the undertaking of the common carrier, or limit his obli-

> gation in the care and management of that which is entrusted to him. It is to describe and define the subject matter of the contract, so far as the parties care to define it, for the purpose of showing of what value that is which comes into the carrier's possession, and for which he must account in the performance of his duty as a carrier. It is not in any proper sense a contract exempting him from liability for the loss, damage or injury to the property, as the shipper describes it in stating its value for the purpose of determining for what the carrier shall be accountable upon his undertaking, and what price the shipper shall pay for the service and for the risk of loss which the carrier assumes.' ''

Unless defendant is relieved from liability in this case because of the fact that the property is of a different character than that described in the bill of lading, and upon which the transportation rate is based, it would not be relieved from such liability because of any provision to that effect in the bill of lading. In *Kansas City Southern Ry.* v. *Carl,* 227 U. S. 639, it is held that an agreement to release a carrier for part of a loss due to negligence is no more valid than one for a complete exemption, and neither is such a contract any more valid because it rests upon a consideration than if it was without consideration. In the opinion in this case the court says (pages 650-651):

> "Is the contract here involved one for exemption from liability for negligence and therefore forbidden? An agreement to release such a carrier for part of a loss due to negligence is no more valid than one whereby there is complete exemption. Neither is such a contract any more valid because it rests upon a consideration than if it was without consideration. A declared value by the

shipper for the purpose of determining the applicable rate, when the rates are based upon valuation is not an exemption from any part of its statutory or common-law liability. The right of the carrier to base rates upon value has been always regarded as just and reasonable. The principle that the compensation should bear a reasonable relation to the risk and responsibility assumed is the settled rule of the common law."

"The ground upon which such a declared or agreed value is upheld is that of estoppel. Thus in *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331, 340, 341, it is stated:

" 'As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them. If the shipper is guilty of *fraud or imposition*, by misrepresenting the *nature or value* of the articles, he destroys his claim to indemnity because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed.' "

In *Great Northern Ry.* v. *O'Connor*, 232 U. S. 508, there was no specific agreement in the bill of lading exempting the carrier from liability for the loss of property of a higher value than that stated therein. The only provision in the bill of lading in reference to

value was the notation, "Released to $10 per cwt." It was shown that the rate paid was the rate provided in the filed tariffs of the carrier for the transportation of household goods when the declared value did not exceed $10 per cwt. In reversing a judgment in favor of the plaintiff for the full value of the property, the court said (page 515):

> "But so long as the tariff rate, based on value, remained operative it was binding upon the shipper and carrier alike and was to be enforced by the courts in fixing the rights and liabilities of the parties. The tariffs are filed with the Commission and are open to inspection at every station. In view of the multitude of transactions, it is not necessary that there shall be an inquiry as to each article or a distinct agreement as to the value of each shipment. If no value is stated the tariff rate applicable to such a state of facts applies. If, on the other hand, there are alternative rates based on value and the shipper names a value to secure the lower rate, the carrier, in the absence of something to show rebating or false billing, is entitled to collect the rate which applies to goods of that class, and if sued for their loss it is liable only for the loss of what the shipper had declared them to be in class and value."

It will be noted that while, in the cases above cited the alternative rates were based upon value, the court distinctly states that the carrier when sued by a shipper for the loss of goods is liable only for what the shipper has declared them to be in *class* and *value*. In the present case the alternative rates were based upon the class or character of the property instead of upon value, and the shipper has been permitted to recover for the loss of goods of a different class than those described

in the contract, and upon which the charges were based.

In *Mo. Kans. & Tex. Ry.* v. *Harriman*, 227 U. S. 657, Mr. Justice Lurton, writing the opinion, says (page 670):

> "That the value of the cattle shipped under this valuation did greatly exceed the valuation therein represented, may be true. It only serves to show that the shipper obtained a lower rate than he was lawfully entitled to have by a misrepresentation. It is neither just nor equitable that he shall benefit by the lower rate, and then recover for a value which he said did not exist, in order to obtain that rate. Having obtained a rate based upon the declared value, he is concluded, and there is no room for parol evidence to show otherwise."

In *Southern Ry.* v. *Prescott*, 240 U. S. 632, the court says (page 638):

> "It is also clear that with respect to the service governed by the Federal statute the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates (*Tex. & Pac. Rwy.* v. *Mugg*, 202 U. S. 242; *Kansas Southern Rwy.* v. *Carl*, 227 U. S. 639, 652; *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97, 112; *Louis & Nash. R. R.* v. *Maxwell*, 237 U. S. 94), and the established principle applies equally to any stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services within the purview of the Act. *Chicago & Alton R. R.* v. *Kirby*, 255 U. S. 155, 166; *Atchison &c. Ry.* v. *Robinson*, 233 U. S. 173, 181. This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions

against preferences and discriminations. No carrier may extend any privileges or facilities, save as these have been duly specified."

In *D'Utassey* v. *Barrett*, 219 N. Y., 420, Pound, J., writing the opinion, says, (p. 425-6):

> "The reason for the rule sustaining the declared and agreed valuation is to prevent fraudulent practices by shippers in obtaining a lower rate by under valuation. (*Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 652; *Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278.)" * * * But the contract in suit does not evade the liability; it merely fixes the valuation of the goods when liability is established. In an action for damages against the carrier, the shipper is bound by the terms of the contract, and it is of the highest importance that competent parties be held to the terms of their valid contracts." * * * "The contention of appellant that the agreed value does not conclude the shipper as against the acts of employees outside the scope of their employment cannot be sustained without ignoring the terms of the contract, disregarding the intent of the parties and of the acts of Congress regulating interstate transportation and holding the carrier to a different responsibility than that which it assumed."

Although most of the decisions referred to above involve shipments with respect to which the alternative rates of the carrier were based upon value, the principles established in those cases apply to a case like the present where the alternative rates are based upon the character of the property instead of upon its value.

In this case the alternative rates of the carrier were based upon the class or nature of the goods instead of

upon value. Official Classification No. 38 (Defendant's Exhibit "D", page 51) provided for a first-class rate on dry goods, and a double first-class rate on furs. The first-class rate from New York to Cincinnati was 65c per hundred, and double first-class rate $1.30 per hundred. The rate charged was the first-class.

Under Section 6 of the Interstate Commerce Act defendant is required to file with the Interstate Commerce Commission schedules showing rates, fares and charges for the transportation of all property transported by it. That section further provides that "the schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, *and shall contain the classification of freight in force.*"

The plaintiff is charged with knowledge of the provisions of the classification filed with the Interstate Commerce Commission to the same extent that he would be charged with knowledge of rates based on value, and is conclusively presumed to have known that dry goods were classified as first-class for the purposes of fixing the rate for transportation, and furs were classified as double first-class. The agreement entered into between the parties, therefore, consisted of the bill of lading, in which the property is described as dry goods, and the tariffs filed with the Interstate Commerce Commission, specifying the rate to be charged for the transportation of dry goods, and was an agreement on the part of the defendant to transport dry goods and not furs.

The Federal common-law rule prior to the enactment of the Interstate Commerce Act was that a common carrier was not liable for the loss of goods of a different character than those which it had agreed to transport and for the transportation of which it received no compensation. (*Humphreys* v. *Perry*, 148

U. S. 627.) In that case it was held that the plaintiff was not entitled to recover for the loss of a trunk of jewelry which he offered to and which was checked by the defendant as his personal baggage, although he had paid a charge for the excess weight of the property. The ground upon which the carrier was held not liable was because there was no agreement on its part to transport property for the plaintiff except personal baggage, and as the contents of the trunk lost did not consist of the plaintiff's personal baggage there was no liability because there was no agreement to transport that property. In the opinion on this case the court says (page 641):

> "This principle is commented on in Story on Bailments, 9th ed., sec. 565, where it is said: 'It is the duty of every person sending goods by a carrier to make use of no fraud or artifice to deceive him, whereby his risk is increased, or his care and diligence may be lessened. And if there is any such fraud or unfair concealment, it will exempt the carrier from responsibility under the contract, or, more properly speaking, it will make the contract a nullity.'"

In *Hart* v. *Pennsylvania Railroad Co.*, 112 U. S. 331, 342, the court says (page 342):

> "As relating to the question of the exemption of a carrier from liability beyond a declared value, reference may be made to section 4281 of the Revised Statutes of the United States (a re-enactment of section 69 of the act of February 28, 1871, ch. 100, 16 Stat. 458), which provides, that if any shipper of certain enumerated articles, which are generally articles of large value in small bulk, 'shall lade the same, as freight or baggage, on any vessel, without at the time of such lading giving to

> the master, clerk, agent, or owner of such vessel receiving the same, a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner, nor shall any such master or owner be liable for any such goods, beyond the value and according to the character thereof so notified and entered.' The principle of this statute is in harmony with the decision at which we have arrived."

The rates established by railroad companies for the transportation of most articles are based on the classification of the property as shown by Official Classification No. 38 (Defendant's Exhibit "D"). A lower rate than that to which the shipper is entitled under the classification and tariffs of the carrier can as easily be obtained by a shipper by inserting an erroneous description of the character of the property in the bill of lading as by understating its value. The evidence in this case shows that this shipper had made other shipments of furs described as dry goods, and presumably he had obtained the benefit of the lower rate in those cases. His truckman testified that he had received instructions from his employer to describe all shipments received from this firm as dry goods, although it is conceded that they dealt in nothing but furs.

To permit the plaintiff to recover in this case the value of furs when the rate which he was charged was the lower rate applicable to dry goods, would enable him to obtain a preference over other shippers of furs who have correctly described their property in the bill of lading and paid the higher rate applicable to goods of that class, contrary to the provision of the Interstate Commerce Act.

POINT TWO.

The fact that the Trial Court found the misdescription was made without fraudulent intent is not material; the plaintiff is concluded by the bill of lading and the filed tariffs, and his remedy if any is against his agent who misdescribed the property.

The Appellate Division held that plaintiff was bound by the description of the property inserted in the bill of lading by his agent. The plaintiff's acceptance of the bill of lading precludes him from recovering for goods of a different class than those described, irrespective of whether or not the misdescription was fraudulent.

In *Great Northern Ry. Co.* v. *O'Connor, supra*, the facts were that plaintiff had personal effects weighing 545 pounds and worth $598, which she delivered to a transfer company, which was also a forwarder, to box and ship from Minneapolis to Portland, Oregon. The regular freight rate for such a shipment would have been $3 per cwt., but without express authority from her the company forwarded her goods with others under the terms of a tariff which named $1 as the rate on carload shipments of household goods valued at less than $10 per cwt. Although it appears that there was no fraudulent misstatement by the plaintiff, it was held that she was not entitled to recover in excess of the valuation upon which the freight charges were based; that she was bound by the bill of lading and her remedy, if any, was against the forwarding company.

In *Wells, Fargo & Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469, it appears that the consignors kept in their shipping office a book containing blank express receipts. One of these was filled out by their shipping clerk. When the wagon of the express company called at the office the express agent signed the receipt and the pack-

age was delivered to him by a boy assistant to the shipping clerk. No questions were asked as to the value of the property, and no value declared other than as shown in the receipt. The clerk who wrapped and marked the package did not know the value of it, and had no actual knowledge of the rates of the express company. The ground upon which the judgment in that case was reversed by the Supreme Court of the United States is stated in the opinion by Mr. Justice Lurton (page 476) as follows:

> "But the shipper in accepting the receipt reciting that the company 'is not to be held liable beyond the sum of fifty dollars, at not exceeding which sum said property is hereby valued, unless a different value is hereinabove stated,' did declare and represent that the value did not exceed that sum, and did obtain a rate which he is to be assumed to have known was based upon that as the actual value. There is no substantial distinction between a value stated upon inquiry, and one agreed upon or declared voluntarily. The rate of freight was based upon the valuation thus fixed, and the liability should not exceed the amount so made the rate basis. *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331, 338."

In *Reid* v. *American Exp. Co.*, 241 U. S. 544, the owner of an automobile delivered it to an express company in London to be forwarded to New York, declaring its value to be far in excess of $100. The express company had it boxed and delivered it to a steamship company, and accepted a bill of lading with a limitation of liability to $100. The property was damaged while being discharged by a stevedore from the ship. It was held that the liability of the steamship company did not exceed $100, that the stevedore was liable for the differ-

ence between that amount and the actual value of the property; and in case of failure to recover against the stevedore, the express company was liable to the shipper for the difference because it had accepted a bill of lading in which the value of the property was limited to $100, without authority from the owner.

The bill of lading which was issued by the defendant to the plaintiff in this case is a standard form of straight bill of lading approved by the Interstate Commerce Commission by its order No. 787 of June 27, 1908 (In the matter of Bills of Lading, XIV I. C. C. Reports, p. 346). In that form, a blank space is provided for the description of the articles and special marks, if any. The description of the property was inserted in the bill of lading by the expressman employed by the shipper, and after the property was delivered to the defendant and receipted for by it the shipper accepted the bill of lading containing the description inserted by his expressman. The plaintiff is, therefore, estopped from recovering the value of goods of a different character than those described in the contract of transportation, and upon which the charges were based and his remedy, if any, is against the expressman who misdescribed the contents of the case.

POINT THREE.

The Court erred in admitting evidence as to the marks on the case of goods.

It is alleged in the complaint in this action that "in consideration of a reasonable compensation then agreed to be paid to it by the plaintiff *and which compensation was the usual freight rate for dry goods* between New York City and Cincinnati," defendant agreed safely to carry the goods in question to Cincinnati. It would

have been unlawful and contrary to the filed tariffs for the defendant, if the goods had been described in the bill of lading as "furs," to have made an agreement to transport them at the lower rate provided in said schedules for the transportation of dry goods.

In *Atchison &c. Ry. Co.* v. *Robinson*, 233 U. S. 173, plaintiff's recovery was based upon an alleged oral agreement made by him with the agent of the defendant for the transportation of livestock. Plaintiff signed and accepted a livestock bill of lading, and the rate which he paid for the transportation of the property was the rate shown in the filed tariffs of the defendant for the transportation of property shipped subject to the terms and conditions of that bill of lading. In the opinion in that case the court says (page 180):

> "We regard these cases as settling the proposition that the shipper as well as the carrier is bound to take notice of the filed tariff rates and that so long as they remain operative they are conclusive as to the rights of the parties, in the absence of facts or circumstances showing an attempt at rebating or false billing. *Great Northern Ry. Co.* v. *O'Connor*, *supra*. To give to the oral agreement upon which the suit was brought, the prevailing effect allowed in this case by the charge in the trial court, affirmed by the judgment of the Supreme Court of the State, would be to allow a special contract to have binding force and effect though made in violation of the filed schedules which were to be equally observed by the shipper and carrier. If oral agreements of this character can be sustained then the door is open to all manner of special contracts, departing from the schedules and rates filed with the Commission. *Kansas City Southern Ry. Co.* v. *Carl*, *supra*, (p. 652). To maintain the supremacy of such oral agreements

> would defeat the primary purposes of the Interstate Commerce Act, so often affirmed in the decisions of this court, which are to require equal treatment of all shippers and the charging of but one rate to all, and that the one filed as required by the act."

In the present case prevailing effect has been given to the marks on the case over the description of the property in the bill of lading, and the defendant was held liable for the loss of goods of a different character than those which it had agreed to transport, because of the admission over the defendant's objection and exception of evidence that the plaintiff had marked the value and a description of the contents on the case itself.

In *D'Utassy* v. *Barrett, supra* (p. 426), it is said:

> "that having obtained a rate based on the declared value the shipper is concluded and there is no room for parol evidence to show otherwise. (*Mo., K. & T. Ry. Co.* v. *Harriman,* 227 U. S. 657, 670);"

Under the authorities above cited, it is respectfully submitted that inasmuch as the plaintiff obtained a rate based upon the declared nature of the property he should not have been permitted to introduce evidence of the marks on the case for the purpose of holding the defendant to a different liability than that evidenced by the bill of lading and filed tariffs.

POINT FOUR.

There was no duty on the part of the defendant to inspect the contents of the case and it is not liable because of its failure to do so.

In *Wells, Fargo & Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469, the defendant's rules, which were filed with the Interstate Commerce Commission, required that the agent of the express company ask the shipper the value of the property, and insert the value stated, or if no value was stated, stamp the package, "Value asked and not given." This was not done. The State court affirmed a judgment in favor of the plaintiff, upon the ground that the company's agent had failed to perform a plain duty, and it was in no attitude to complain that the shipper did not state the value. That judgment was reversed by this Court, which held that the shipper in accepting the bill of lading represented that the value did not exceed the sum specified therein, that the rate of freight was based upon the valuation and the liability should not exceed the amount so made the rate basis.

And in *Great Northern Ry. Co.* v. *O'Connor, supra*, the court says (page 515) "in view of the multitude of transactions it is not necessary that there shall be an inquiry as to each article or a distinct agreement as to the value of each shipment."

If a carrier is liable only for the value specified in the bill of lading issued to a shipper when its filed rules require its agent to ask the value of the shipper and insert the value stated in the bill of lading and he fails to do so, this defendant certainly was not required to open and inspect the contents of this case to ascertain whether the description in the bill of lading was correct, even though under the bill of lading it had the right to make such inspection. There is no obligation on the

part of a carrier to inspect the contents of all cases of goods which it receives.

> "The volume and methods of the business of transportation by railroads and transportation lines, render it practically impossible in most cases for the carrier to ascertain by examination the contents of packages received for carriage." *Miller* v. *Hannibal & St. Joseph R. R.*, 90 N. Y. 435.

The testimony of defendant's witness Bulger shows that it is not the custom of the defendant to have the contents of cases of goods inspected except where defendant has reason to believe that a particular shipper is misrepresenting the character of property delivered to it for transportation as described in the shipping receipt. The provision in the Bill of Lading merely reserves to the carrier the right to assess correct charges if it discovers by an inspection that the property has been misdescribed but is not an agreement on its part to make such inspection. The duty to correctly describe the contents of cases is imposed on the shipper by the Statute and the Schedules filed pursuant thereto.

It is respectfully submitted the judgment should be reversed.

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